No. 13,884

IN THE

United States Court of Appeals

For the Ninth Circuit

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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ARGUMENT.

Introductory.—Appellee's Brief contends that a portion of our point I and all of our point III, both relating to the instructions, should be disregarded because those points were not raised below in compliance with Rule 30, Rules of Criminal Procedure. Both points were first raised by trial counsel in the arguments on motion for a new trial (R. 1984-1985; R. 1978-1979).

Appellee's Brief fails to refer to Rule 52(b), and to the fact that it was settled law before Rule 52(b) was adopted, and has continued to be so since, that substantial errors in the instructions will be considered on appeal, even though not raised below. Such was the law

before 1946, when Rule 52(b) became effective. *Screws v. United States,* (1945) 325 U.S. 91, 106-107; *Anderson v. United States,* (CA 9, 1946) 157 F. 2d 429. The *Screws* case is a particularly pertinent authority, for in it the Supreme Court held that wilfulness when used in a civil rights statute means precisely what it means in the statute on which the indictment herein was based, and reversed the conviction because the instruction failed to explain wilfulness properly. No exception had been taken below to the instruction, but the Supreme Court held that it was required to reverse anyway, because the error was "so fundamental as not to submit to the jury the essential ingredients of the * * * offense."[1]

Subsequent to the adoption of Rule 52(b), the rule has been held the same. *Fisher v. United States,* (1946) 328 U.S. 463; *Samuel v. United States,* (CA 9 in bank, 1948) 169 F. 2d 787; *Jones v. United States,* (CA 9, 1949) 175 F. 2d 544; *Schino et al. v. United States,* (CA 9, Dec. 2, 1953) ..... F. 2d ....., 54-1 USTC 9105; *United States v. Raub,* (CA 7, 1949) 177 F. 2d 312; *United States v. Balodimas,* (CA 7, 1949) 177 F. 2d 485; *Tatum v. United States,* (CA D.C., 1951) 190 F. 2d 612.[2] This Court stated the proposition succinctly in the *Samuel* case:

> "In a criminal case the court must instruct on all essential questions of law involved, whether or not

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[1]Although several justices dissented, none disputed the propriety of considering the assertion of error.

[2]At several places in Appellee's Brief, the suggestion is obliquely made that the errors at the trial should be glossed over because the trial lasted a month and there was sufficient evidence to convict. In each of these cited cases, as well as the two cited for the rule antedating the adoption of Rule 52(b), there was sufficient evidence to sustain the verdict, but wherever prejudicial error was found reversal resulted.

Furthermore, most of the error herein derived from the stubborn refusal of the prosecutor to entertain the possibility that objections timely made by the defence might be well taken. The prosecution has only itself to blame for the way it tried this case.

it is requested to do so. (Citations omitted.) We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all."

Accordingly, if the instructions were substantially prejudicial, this Court should reverse.

I. THE JURY WAS IMPROPERLY INSTRUCTED ABOUT THE MEANING OF WILFULNESS.

A jury charge is not an abstraction. Its function is to remove legal principles from the realm of the abstract and present them to the jury in terms suitable for application to the facts before that jury. The fault of the instructions given below lies in their tendency to mislead the jury concerning the law applicable to the evidence *in this case.*

It is no answer to our challenge to reply, as Appellee's Brief does, that (1) there are abstract statements in the charge which are unobjectionable,[3] and (2) the same charge was not found objectionable in other cases where the evidence did not present the same issue.

In our opening brief we cited four decisions[4] which emphasize that a correct abstract charge will not save an incorrect concrete charge. Characteristically, Appellee's

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[3]Even here, appellee does not distinguish good from bad. Appellee's brief, p. 9, refers approvingly to the language we object to: "responsibility of at least good faith and ordinary diligence." The brief fails to reply to our point that the presence in that language of the conjunctive "and" converts it into a standard of negligence.

[4]*Bollenbach v. United States,* (1946) 326 U.S. 607; *Spurr v. United States,* (1899) 174 U.S. 728; *United States v. Link,* (CA 3, 1953) 202 F. 2d 592; *United States v. Martell,* (CA 3, 1952) 199 F. 2d 670, cert. den. 345 U.S. 917.

Brief does not refer to or attempt to distinguish any of them.[5] Perhaps this is intended to be an admission that the principle for which we cited them is too well established to be challenged.

Appellee argues that an instruction is to be read as a whole, citing *Boyd v. United States,* (1926) 271 U.S. 104. We agree both with the rule and the citation, which is a case where a patent ambiguity disappeared when the doubtful passage was read in the context of the whole. Neither the rule nor the citation, however, supports the conclusion that a jury can be relied on to disregard erroneous paragraphs in an instruction because elsewhere the erroneous passages are contradicted by unobjectionable passages. If the jury knows enough law to disregard the bad and be guided only by the good, it is difficult to explain why judges need instruct juries at all.

The instant case is, however, devoid of even this difficulty. We do not have here two conflicting concrete instructions. We have a short, correct abstract statement later explained by three paragraphs of erroneous concrete statement. This is reversible error.

The suggestion in Appellee's Brief (p. 13) that this Court and other courts have approved this identical instruction is explainable only by appellee's apparent belief that a canned instruction unobjectionable in one case is unobjectionable in all. But this is not so, for, as we have said, a jury charge is not an abstraction.

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[5]It does, however, cite on another point *United States v. M. Kraus & Bros., Inc.,* (CA 2, 1945) 149 F. 2d 773, without, however, calling the Court's attention to the fact that that decision was reversed in *M. Kraus & Bros., Inc. v. United States,* (1946) 327 U.S. 614. The Supreme Court decision held that a bad instruction was reversible error even though it was mingled with good passages, citing the *Bollenbach* case, supra.

It is true that substantially the same instruction was included in that given the jury in *United States v. Banks.*[6] It is not true that the appellate court considered the propriety of that instruction. Furthermore, as in the cases from this Court where appellee states the same instruction was given,[7] the instruction could not possibly have been prejudicial on the facts actually presented. In none of the cases cited could the jury have been misled by a confusion between negligence and wilfulness, or by an injection of tort principles of *respondeat superior.* Where, as in the instant case, such confusion could have misled the jury in a concrete situation instead of an abstract one, similar instructions have been held reversible error. *Lurding v. United States,* (CA 6, 1950) 179 F. 2d 419, 421; *Inland Freight Lines v. United States,* (CA 10, 1951) 191 F. 2d 313, 316.

Accordingly, the defendants were prejudiced by the improper instruction that they were criminally liable for negligence and for the acts of others. The conviction should be reversed.

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[6](D. Minn., 1952) 108 F. Supp. 14, aff'd (CA 8, 1953) 204 F. 2d 666, cert. den. No. 259, Oct. Term 1953, 74 S. Ct. 73.

[7]An examination of these decisions (*Remmer v. United States,* (CA 9, 1953) 205 F. 2d 277, 290, cert. granted No. 304, Oct. Term, 1953; *Barcott v. United States,* (CA 9, 1948) 169 F. 2d 929, 932; and *Sullivan v. United States,* (CA 9, 1935) 75 F. 2d 622), will demonstrate that this Court was not asked to pass on the instructions we here challenge. We have examined the defendant's briefs filed in this Court and in the Supreme Court in the *Remmer* case, and find no discussion of this instruction, although other instructions were challenged. It is obvious from the facts in the *Barcott* case that the defendant's criminal responsibility for the acts of others or for his own negligence was not an issue in it. The *Sullivan* opinion shows affirmatively that the instructions were free from error and the point we raise was not present.

II. THE CHARGE ERRONEOUSLY INJECTED ELEMENTS OF A LESS SERIOUS OFFENCE FOR WHICH DEFENDANTS WERE NOT INDICTED.

Appellee seeks to defend this error on the ground that acts constituting the lesser offence might, when taken with other acts, properly establish guilt of the offence charged herein. This attempted justification is insufficient.

The instructions contain an adequate discussion of the relevance of the acts referred to. This discussion is quoted on page 10 of Appellee's Brief, and appears at R. 1942-1943. It was this charge to which we had reference at p. 51 of our opening brief. This charge was sufficient. It was error and was substantially prejudicial for the trial judge later to inform the jury that the law required defendants to keep "sufficient" records. The error lay in the failure to inform the jury (1) that failure to keep "sufficient" records was not an offence unless it was "willful," and (2) that such failure was not charged as a crime and was not alone enough to warrant a conviction. *Brink v. United States,* (CA 6, 1945) 148 F. 2d 325, 328; *Spurr v. United States,* (1899) 174 U.S. 728.

III. THE INSTRUCTIONS IMPROPERLY FAILED TO INSTRUCT THE JURY THAT DEFENDANT DR. MITCHELL WAS CONCLUSIVELY ESTABLISHED TO BE INNOCENT OF INTENT TO EVADE TAXES IN THE YEARS 1942-1946.

Appellee's principal defence for this error is that trial counsel did not properly preserve it below. As we have shown above, under Rule 52(b) this error should nevertheless be considered.

Appellee's Brief (p. 17) attempts to justify this error by setting forth the simple syllogism on which the prosecutor evidently based his conclusion that he could ignore the fact of prior acquittal. It will be observed that no

authority is cited for a single premise of the syllogism[8] or a single statement made. The fact that the Supreme Court's decision in *Sealfon v. United States,* (1948) 332 U.S. 575, should leave no doubt on this point is ignored as completely as if our opening brief had not discussed it at all.

Elsewhere in the brief (pp. 28-32) appellee demonstrates the relevance the evidence regarding 1942-1946 would have had absent the prior acquittal. We have, however, not challenged the admissibility of the evidence but merely the failure of the trial judge to instruct the jury properly about the inferences that could be drawn from it.

Appellee's discussion therefore entirely fails to be responsive to the res judicata issue involved in this case.

IV. THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANTS THEIR RIGHT TO CROSS-EXAMINE A KEY PROSECUTION WITNESS.

Appellee dismisses this ground of defendants' appeal with the bare assertion that it is only "a matter of form" involving the "use of leading questions." (Appellee's Br. 24.) Therefore, appellee concludes, the matter is one for the trial court to determine within its recognized discretion to control cross-examination of witnesses.[9]

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[8]The premise that a conviction would never be res judicata ignores *Emich Motors Corp. v. General Motors Corp.,* (1951) 340 U.S. 558, 568-570; *Local 167 v. United States,* (1934) 291 U.S. 293, 298-299; and *Frank v. Mangum,* (1915) 237 U.S. 309, 334.

[9]The cases cited in Appellee's Brief (p. 27) deal with examples of the trial court's restriction of the scope of cross-examination, not with its complete denial. None of them is, therefore, in point. The trial court's discretion to control the scope of cross-examination does not include power to prohibit it. *Alford v. United States,* (1931) 282 U.S. 687.

In the first place, no federal case cited by appellee, nor any we have been able to find, sustains the right of a trial court to prohibit the use of leading questions on cross-examination. *St. Clair v. United States,* (1894) 154 U.S. 134, held that in its discretion the trial court could *extend* the right to use leading questions to the direct examiner. It did not involve the right to *restrict* such use where normally it is proper. The only federal case which we have found involving the point at issue here is *Arnette et al. v. United States,* (CA 4, 1946) 158 F. 2d 11, where the court said: "it is no ground for excluding leading questions on cross-examination that the witness is favorable to the side of the examiner."

Furthermore, we cannot imagine how any party could be in a weaker position to dismiss the denial of the right to use leading questions as a mere matter of form than the prosecution is here. The prosecution called this witness as an adverse witness (R. 264) and proceeded to examine her on direct examination by frequent use of leading questions, there being eight of them in the first three pages of the examination (R. 265-267). If this were unimportant, as appellee now contends, why did appellee depart from the usual procedure?[10]

In the second place, more than the right to use leading questions was denied to the defence. After the prosecution had indulged itself with all the privileges of a cross-examiner, defence counsel began cross-examining in the usual way, only to be brought up short by a ruling that

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[10]Appellee's characterization of this right which the prosecution claimed exclusively for itself intimates that we may have hit the mark when we suggested (Op. Br. 63) that the real motive of the prosecution in calling this witness as adverse was to get "before the jury, under the guise of impeachment," the grand jury transcript. Characteristically, Appellee's Brief makes no attempt to answer our point that this was independent reversible error, nor to distinguish the many cases, including *Kuhn v. United States,* (CA 9, 1928) 24 F. 2d 910, cert. den. 278 U.S. 605, which so hold.

he must ask direct questions. In answer to a question from defence counsel, the trial court stated that the defence could not cross-examine. (R. 758-759.) Interestingly enough, during that discussion the prosecutor volunteered the suggestion that defence counsel could "call the witness himself as his own witness and question fully in regard to these things" (R. 759). Since that would clearly have deprived the defence of the right to ask leading questions, the prosecutor's suggestion would not have expanded any defence rights which the ruling abridged, if leading questions had been all that were involved.

Further impairments of effective cross-examination soon developed. These may be found at R. 824-827, 828-831, 835-836, 839-841. They have been discussed at pages 65-66 and 70-71 of our opening brief, and have been ignored, not answered, by Appellee's Brief. As can be seen from the record, so little latitude was allowed defence counsel that he was finally driven to make the witness his own witness (as the prosecution had earlier suggested he do) in order to examine her at all.[11] (R. 836-837.)

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[11]This desperate measure was taken after the following events occurred in sequence: the defence was denied the right to explore the circumstances in which the witness had given the testimony to the grand jury about which she had testified on direct (R. 825-826); it was denied the right to develop the witness' then state of mind due to her husband's cancer (R. 827-828); it was denied the right to interrogate her about her grand jury testimony concerning what defendant Dorothy Mitchell had told her (R. 830). At this point defence counsel was even denied the privilege of making an offer of proof in chambers out of the jury's presence (R. 830-831). Finally, an obviously proper question designed to test her knowledge of the facts at the time she gave the grand jury testimony the prosecutor had already put into the record was objected to as a "leading question, not covered by the direct." When this objection was sustained (R. 835), defence counsel surrendered and made the witness his own (R. 836-837), thus putting to an end the prosecution's fears that the defence would be able to impeach her.

It is therefore evident from the record that this is an even more flagrant case of impairing the right of cross-examination than *Alford v. United States,* (1931) 282 U.S. 687. Nor can this error be excused on any ground that the witness was not important. As appellee itself says, "A reading of the record indicates that the cause was primarily one of credibility of witnesses. The jury chose to believe Mrs. Cowart and Mrs. Pierson and to disbelieve appellants." (Br. 7.) But appellants were cross-examined; Mrs. Cowart was not. Since Mrs. Cowart's testimony and credibility were admittedly so crucial to the prosecution's case, the convictions below must be reversed in order that her story, like those of all the other witnesses, may be tested by cross-examination.

V. THE DISQUALIFIED JUROR SHOULD HAVE BEEN DISMISSED.

We do not contend that a defendant is entitled to a jury free of any prior impressions, contrary to what Appellee's Brief (p. 18) charges, but we do contend that a defendant is entitled to a jury free of "positive and decided opinion." This is what *Reynolds v. United States,* (1879) 98 U.S. 145, 157, held was the constitutional standard, and this is what the defendants herein did not get.

The quotations from the *Reynolds* opinion in Appellee's Brief (pp. 20-21) are good law today, as is the extract from that opinion which we have quoted above. Our complaint is that the judge did not ask the prospective juror directly if he had a positive opinion, and did not understand that his answers to the indirect questions indicated that he had.

Characteristically, Appellee's Brief fails to discuss the two cases we cited which disqualified jurors on substan-

tially identical facts, but instead contents itself with generalities. To one of these we must take exception. The suggestion that all intelligent prospective jurors have some opinions about the specific cases they are to hear, based on their reading the newspapers (Appellee's Brief p. 19), is contrary to notorious fact. Few people not professionally concerned with the administration of criminal justice select such news to read in advance of the actual trials, except in the exceptional case which inspires headlines. This was not such a case. Undoubtedly more people knew of it because it had been tried once before than if it had not, but a defendant at a second trial has the same constitutional rights as one at a first trial.

VI. REFUSAL OF THE COURT BELOW TO COMPEL PRODUCTION OF AN IMPEACHING STATEMENT IS REVERSIBLE ERROR.

The statement in question is that taken of *Dr. Mitchell* by the government on November 13, 1950. It was this statement which the prosecutor used on cross-examination to impeach *Dr. Mitchell.* And it was this statement which was denied to the defence, although request was made for its inspection. (R. 1686-1691.)

In its brief, appellee makes three arguments to support the court's ruling: (1) the statement was shown *to the witness,* if not to defence counsel; (2) defence counsel, independently of the statement, attempted to reconcile the inconsistencies; and (3) the procedure followed in the use of *Mrs. Cowart's grand jury statement* was "appropriate" and "acceptable." None of these arguments has any merit.

The first ignores the fundamental right of the defendants to use the complete document, after the prosecution

has used parts of it for impeachment. *Chicago, M. & S. P. Ry. Co. v. Artery,* (1890) 137 U.S. 507, 520; *Home Benefit Association v. Sargent,* (1892) 142 U.S. 691, 695. The fact that the statement was shown to the witness, who was Dr. Mitchell, one of the defendants, does not satisfy this rule. It is defence counsel who represents the defendants before the court, and it is he who must make the necessary selection and evaluation of evidence on their behalf. Thus, the defence's right to introduce the whole of the impeaching statement[12] was subverted by the court's ruling.

The second contention also ignores the same rule. Furthermore, it rests upon a misinterpretation of the record, caused by the prosecution's erroneous insistence that the November 13, 1950 statement of Dr. Mitchell not be marked for identification (R. 1690-1691). On redirect examination, defence counsel then asked Dr. Mitchell about his *June 26, 1947* statement, also voluntarily given to the government. It was at this point, without any mention of the 1950 statement which is the one in issue, that the Doctor was asked when he first recalled talking to Mrs. Cowart of Mrs. Mitchell's withdrawals. (R. 1732-1735.)[13] Had the prosecution permitted these statements to be identified, this confusion would not have occurred.

The third argument is not understandable. The fact that in this respect the court and the prosecutor handled the Cowart grand jury statement properly can scarcely eliminate or even atone for their error in handling the Mitchell statement. Nor do the authorities cited support

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[12]See the authorities cited at 83-84 of our Opening Brief. Appellee has made no attempt to answer or to distinguish these precedents.

[13]Moreover, by concentrating upon this one attempt of defence counsel to rehabilitate his witness *without having seen* the impeaching document, appellee overlooks its concession of "multiple use" of the statement by it on "several different subjects during the course of the (witness') interrogation" (Appellee's Br. 42).

this prong of its argument. *United States v. Socony-Vacuum Oil Co.,* (1940) 310 U.S. 150, 231, recognizes the rule established in our opening brief.[14] Both *United States v. Dilliard,* (CA 2, 1938) 101 F. 2d 829, 837, and the references to *Wigmore on Evidence* merely deal with the right *of the witness* to see the impeaching document; as we pointed out in our opening brief (p. 83), Professor Wigmore says it is "universally conceded" that *the opposing party* may use the remainder of a statement first exploited by one party. *United States v. M. Kraus & Bros. Inc.,* (CA 2, 1945) 149 F. 2d 773, was reversed by the Supreme Court *sub. nom. M. Kraus & Bros. Inc. v. United States,* (1945) 327 U.S. 614. *Phillips v. United States,* (CA 2, 1945) 148 F. 2d 714, 717, the last of appellee's authorities, is, like the *Socony-Vacuum* decision, an illustration of the lack of prejudice which results when the material sought to be produced is cumulative to matter "appear(ing) elsewhere in the record."

For its error in suppressing the Mitchell statement, the court below should be reversed.

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[14] "Normally, of course, the material so used (for refreshing a witness' recollection) must be shown to opposing counsel upon demand, if it is handed to the witnesses." 310 U.S. at 233. This normal rule was not applied in the Supreme Court's decision for three reasons, none of which is present here: (1) the material was used to refresh the witness' recollection, not to impeach his testimony; (2) the trial judge had personally examined the material and had instructed the jury it was not inconsistent; and (3) the material was cumulative to other competent testimony.

VII. REVERSIBLE ERROR WAS COMMITTED BY THE FAILURE TO PRODUCE FOR INSPECTION CERTAIN EVIDENTIARY STATEMENTS TAKEN BY THE PROSECUTION OF THE WITNESSES OR USED BY THE WITNESSES TO REFRESH THEIR RECOLLECTION.

In seeking support for the trial court's denial of defendants' request of the prosecution to produce documentary statements taken of the witnesses, Dr. Mitchell, Mrs. Cowart, and Mrs. Pierson, appellee makes but one argument, that defendants have not shown these statements were in fact inconsistent with the trial testimony of these witnesses.[15] Hence, appellee argues, defendants were not entitled to see the statements.

Neither appellee's reasoning nor its conclusion stands the acid of analysis. The very premise of appellee's contention was the matter on which the Court of Appeals was reversed in *Gordon v. United States,* (1953) 344 U.S. 414. The Court of Appeals had held[16] that the defendants Gordon and McLeod were not entitled to inspect the prior statements of their accomplice in the crime, because he had already confessed his prior statements were inconsistent with his present testimony. Therefore, the Court of Appeals could see no purpose in requiring the statements to be produced.

For this conclusion the Court of Appeals was reversed by a unanimous Supreme Court. In its decision, the Supreme Court dealt with the fact of admitted inconsistency as being not a help but rather an impediment to its conclusion that inspection was required.[17]

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[15]However, by its later use of the Dr. Mitchell statement, the prosecution itself sought to establish inconsistencies between his trial testimony and this earlier statement (R. 1686-1691).

[16]*United States v. Gordon,* (CA 7, 1952) 196 F. 2d 886, 888.

[17]This analysis is based upon the Court's discussion of the point on pages 420-421, which is quoted in full in the Appendix, *supra.*

Nor do the other authorities cited by appellee support its position. Three of them were cited by the Court of Appeals in the *Gordon* case as a basis for its erroneous decision,[18] and were expressly overruled by the Supreme Court.[19] The other decisions cited antedate the Rules of Federal Criminal Procedure,[20] upon which the *Gordon* decision is founded.

Nor do *Hickman v. Taylor,* (1947) 329 U.S. 495, 504, or *Bowman Dairy Co. v. United States,* (1951) 341 U.S. 214, support appellee's contention. The former, under Federal Rule 26 of Civil Procedure, dealt with an attempt to force production of memoranda prepared by an attorney of his mental impression of his case. The latter, which applied Rule 17(c) of Federal Criminal Procedure, supports defendants' request for production. Contrary to appellee's assertion (Br. 36), it did not involve narrative statements[21] of witnesses, since such statements were expressly excepted from the *Bowman Dairy* subpoena. All other documents of evidentiary value were ordered pro-

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[18]*D'Aquino v. United States,* (CA 9, 1951) 192 F. 2d 338, 375 (concerning the prosecution's work papers, not used in court); *United States v. Walker,* (CA 2, 1951) 190 F. 2d 481, 483; and *United States v. Rosenfeld,* (CA 2, 1932) 57 F. 2d 74, 76.

[19]See the Court's language 334 U.S. at 419, where it states, "Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed * * *."

[20]*Goldman v. United States,* (1942) 316 U.S. 129, 132; *United States v. De Normand,* (CA 2, 1945) 149 F. 2d 622, 625; *United States v. Dilliard,* (CA 2, 1938) 101 F. 2d 829, 837; *Arnstein v. United States,* (CA D.C., 1924) 296 F. 946, 950; and *United States v. Cohen,* (CA 2, 1944) 145 F. 2d 82, 92, all cited at Br. 38-39. The Rules of Criminal Procedure became effective March 21, 1946. Rule 59, 18 U.S.C. Rule 59; *Singleton v. Botkin,* (D. D.C., 1946) 5 F.R.D. 173; *United States v. Claus,* (E.D. N.Y., 1946) 5 F.R.D. 278.

[21]It appears affirmatively from the record that the Dr. Mitchell statement was not narrative but was in question and answer form (R. 1686-1691).

duced.[22] Certainly the best evidence rule as applied in the *Gordon* case, *supra,* requires that the several statements requested be produced for inspection in order that "the trial judge (might) understandingly exercise his discretion * * *." 344 U.S. at 420.

In defence of the trial court's suppression of the witness Whiteside's report, appellee argues that it had not been used in court as a basis for testimony (Br. 40). The record does not support appellee. The witness testified to a figure "shown in the civil report." Defence counsel requested the report, which was unavailable. The prosecutor then handed to Whiteside Whiteside's own report, saying that it too contained the figure. The witness then described the report in hand as his own. Thereupon defence counsel requested its production and offered it for identification. Both the request and the offer were denied. The witness then continued to testify what the report did and did not contain. (R. 612-615.) By this action, the prosecution made the report subject to production at defendants' request. By so using the report to impress the jury with the volume of work done by the witness and with the appearance that the witness' testimony was grounded upon an official report, the prosecution made that report subject to production at defendants' request. See cases previously cited (Opening Br. 89-90).[23]

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[22]That these statements are "evidentiary" under the tests of *Bowman Dairy* is established in the recent decision of *Fryer v. United States,* (CA D.C., 1953) 207 F. 2d 134, 137, Govt's petition for cert. denied Nov. 17, 1953, 22 L.W. 3131. There the Court of Appeals held that "the defendant's statement, which was introduced into evidence, and statements by the witnesses, which might have been introduced for impeachment purposes, were clearly 'evidentiary' as Bowman requires." It was error to deny a request for their inspection.

[23]*D'Aquino v. United States,* (CA 9, 1951) 192 F. 338, 375, the only case cited by appellee, did not rule upon the present situation; in it a request for production of a government report was denied because the report had *not* been used in court.

VIII. THE COURT BELOW SHOULD BE REVERSED FOR RECEIVING EVIDENCE OF ONE DEFENDANT'S DEFICIENCIES IN INCOME TAXES FOR REMOTE EARLIER YEARS.

Appellee argues in its brief (pp. 28-35) that the prosecution's evidence of Dr. Mitchell's deficiencies for 1938-1941 was properly received by the trial court for at least one of three purposes[24] therein stated. If any of these purposes is valid, appellee argues, the evidence was properly received under the doctrine of "multiple admissibility."

But in making this analysis, appellee misunderstands the issue raised in our opening brief, pp. 90-94. The point was there made that even relevant evidence must be excluded if its prejudicial effect outweighs its probative value. That the evidence of the Doctor's deficiencies for 1938-1941 was remote in time is self-evident. That it was also remote in nature and circumstance is shown by appellee's efforts to find a plausible purpose to which the evidence might relate.

The first of these efforts (and the record references cited by appellee in support of it) relates solely to the years 1942 to 1946. See Appellee's Brief, pp. 29-32. The years complained of are 1938 to 1941.

Nor is the second purpose sufficiently pertinent to justify the court's receipt of evidence of prior crimes. The issue on which this evidence was offered, i.e., whether or not the Doctor had paid in full all his prior taxes, was clearly collateral to his guilt for 1947. To restate the effect of the evidence, as appellee has done, does not contribute one iota to its relevancy.

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[24]Each of these purposes relates only to Dr. Mitchell. Appellee makes no answer to our contention that the evidence was clearly bad as to Dorothy Mitchell, Dr. Mitchell's wife and co-defendant, since she was not married to him until 1944 (Opening Br. 91-92). Apparently no answer can be made.

The third ground, that the evidence was available to impeach Dr. Mitchell's credibility, ignores the record. Dr. Mitchell was not the witness at the time the prosecution insisted upon introducing this evidence, nor had he been one. No procedure permits a witness, especially if he is the defendant, to be impeached *before* he takes the stand—in fact, before it is even known whether or not he will testify. For a court to permit the prosecutor to investigate his past crimes under the *Michelson* rule[25] makes a mockery of his constitutional right not to be a witness against himself, and in effect forces him to be a witness later in order to explain or rebut the impeaching evidence already received.

IX. REFUSAL OF THE COURT BELOW TO ADMIT DEFENDANTS' EVIDENCE OF THEIR CASH RECEIPTS IN 1949 AND 1950 IS REVERSIBLE ERROR.

In its answer to this ground of reversal, appellee has raised two arguments in defence of the court's ruling: first, appellee claims that defendants' proffered evidence was properly excluded since it was based on "years following the discovery of the scheme" (Appellee's Br. 44); second, appellee cites cases to establish that cumulative evidence is not proper and therefore the court below was correct.

Both arguments are far afield of this case. The first contention, supported by the *Stoehr* and *Steinberg* decisions,[26] has no application to this evidence, the force of which was to provide a means of testing the accuracy

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[25]*Michelson v. United States,* (1948) 335 U.S. 469, 475-476, cited by appellee on pages 32 and 34 of its brief.

[26]*United States v. Stoehr,* (CA 3, 1952) 196 F. 2d 276, 281-283; *Steinberg v. United States,* (CA 5, 1947) 162 F. 2d 120, 125.

of the prosecution's comparison of 1946 and 1948 cash receipts with those of 1947. Here the fact that the years 1949 and 1950 were *after* 1947 is no bar to their use as a standard for comparison;[27] to the contrary, the relevancy of 1949 and 1950 as standards is strengthened by this very fact. Since the defendants' report of their 1949 and 1950 cash receipts was not completed until after the 1947 indictment, the defendants understandably would be more cautious in compiling this report than normally. Since the defendants were indicted for 1947 principally because of the low ratio of cash receipts to total receipts in that year, evidence of receipts in similar ratio in years after the indictment bear an unusual seal of accuracy and completeness. "Once bitten, twice shy," is the folk expression for this certificate of correctness.[28]

Moreover, it lies ill with the prosecution to argue that 1949 and 1950 were irrelevant because these years relate to subsequent events. The prosecution itself, in first making its damning comparison, used 1946, an earlier year, and 1948, a subsequent year. Having itself chosen a subsequent year, the government can now draw no logical limitation to the use of others by the defendants.

And, finally, the record itself serves to destroy appellee's argument. After having been unsuccessful in introducing evidence of cash receipts in 1949 and 1950, defence

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[27]*United States v. Socony-Vacuum Oil Company,* (1940), 310 U.S. 150, 228, cited by appellee (Appellee's Br. 44), does not establish a rule excluding evidence of all subsequent acts. In *Johnson v. United States,* (1943) 318 U.S. 189, 195, a later decision, the Supreme Court recognized the usefulness of such evidence.

[28]Neither of the cases cited by appellee bears upon this problem. Both involve the use of subsequent innocent acts to show that the allegedly criminal act was innocent; the use of such evidence is restricted, since the subsequent acts may be innocent only because the defendant was "found out." As pointed out above, the opposite situation exists in the present case.

counsel made another offer, this time of the records up to August, 1949, the date of the indictment (R. 1319). This offer, qualified to meet the prosecution's erroneous arguments for excluding all of 1949 and 1950, was also rejected and serves as a ground for reversal herein. None of appellee's arguments reaches this evidence.

Nor does appellee's second argument have any merit. The evidence was not cumulative. At no time were defendants permitted to introduce any evidence upon the point; the court below chose to admit for the jury's consideration only the comparative years selected by the prosecution (Op. Br. 95).

CONCLUSION.

The judgments of conviction should be reversed.

Dated, San Francisco, California,
January 29, 1954.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

EXCERPTS FROM THE OPINION IN GORDON v. UNITED STATES (1953) 344 U.S. 414, 420-421.

"The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance. Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had. Yet, his first statement was that he got the film from Swartz; his first four statements did not implicate these petitioners and

his fifth did so only after the judicial admonition we will later consider. The weight to be given Marshall's implication of the petitioners was decisive. Since, so far as we are now informed by the record, we think the statements should have been admitted, we cannot accept the Government's contention based on a premise that the court was free to exclude them. It was error to deny the application for their production."